Resolved: The United States federal government should substantially curtail its domestic surveillance.

by Stefan Bauschard

"By the time you finish reading the essay, you should have a good idea as to how most of the main arguments on the topic will play out as well as some strategic considerations you should consider when selecting arguments on both sides of the resolution."

Introduction

The controversy related to issues surrounding surveillance became a hot topic for debate when it was disclosed in June of 2013 by former defense contractor Edward Snowden that the U.S. National Security Agency (NSA) and other federal agencies are engaging in extensive surveillance to fight crime and reduce the threat of terrorism.

The magnitude of the disclosure shocked many people, including elected representatives who were unaware of the extent of the surveillance. Civil rights advocates view the surveillance as an assault on privacy and liberty, while law enforcement and national security officials see these mass surveillance programs, and other targeted surveillance programs based on individual suspicion, as essential weapons in the war on terror, the fight against nuclear weapons proliferation, the general protection of U.S. national security, and even efforts to reduce conventional crime.

Since the release of the original story, the controversy has become front page news around the world, with more and more arguably problematic programs described in the leaked trove of Snowden

documents coming to light. New stories appear on a daily basis, making it very easy to research and update.

The federal mass surveillance programs that had been revealed through the spring of 2014 are catalogued in former debater Glenn Greenwald's most recent book, *No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State*, which also offers a page-turning read into Greenwald's initial meetings with Snowden and documentary filmmaker Laura Poitras in Hong Kong, as well as his access to the documents. The initial meetings are also documented in Poitras' *CitizenFour*. Curtailing any of these and other mass surveillance programs will make for arguably strong affirmative cases.

Although I think the recent controversy over these relatively new federal mass surveillance programs aimed at preventing terrorism will make up some of the core cases on the topic, the resolution extends beyond these programs to include any surveillance programs conducted by federal law enforcement agencies, even if they are geared toward preventing more traditional crimes and are targeted in nature rather than based on mass surveillance. There will be many interesting cases related to drug surveillance, border surveillance, and surveillance based on race.

In this essay, I will examine some key terms in the resolution, discuss some important aspects of its wording for the strategic development of arguments on both the affirmative and the negative, and then introduce the main advantages, some of the likely affirmative cases, key disadvantages, main counterplans, and likely kritiks. By the time you finish reading the essay, you should have a good idea as to how most of the main arguments on the topic will play out as well as some strategic considerations you should consider when selecting arguments on both sides of the resolution.

The Resolution

In this section, I will discuss the terms of the resolution and share some strategic implications of the meaning of the terms.

It is widely accepted that *the United States federal government* refers to the central government body in Washington D.C. This governing body is made up of the executive, legislative, and judicial branches. Any of these branches can act in specific, relevant instances to curtail domestic surveillance, though affirmative teams are unlikely to specify which branch would "pass the plan" in order to avoid having to answer agent counterplans. If the affirmative team does choose an agent, it would likely be a court agent (one of the federal district courts or the U.S. Supreme Court). The plan would likely have one or more of these federal courts rule that a particular surveillance practice or program is unconstitutional.

The resolution calls on this actor to essentially lessen its domestic surveillance. (We will discuss *curtail* shortly.)

Surveillance generally means "to keep close watch over someone or something" (Merriam Webster). It is understood to consist of many activities, including physical observation, interception of personal communications, the use of undercover agents, subpoenaing records, audio and video recordings, and the collection of banking and other personal information (definitions & citations).

It is important to understand there are two general types of surveillance: mass surveillance and targeted surveillance. Mass surveillance occurs when an entity (in the case of the resolution, the U.S. federal government) engages in the general surveillance of potentially everyone in a particular way. As the section on specific cases and plans will discuss, anyone who uses email, browses the Internet, or uses a phone to text or make calls could be subject to government surveillance. This type of mass surveillance does not attempt to distinguish between who is innocent and who may be guilty when the surveillance is conducted; it simply engages in the surveillance of everyone in a particular way.

The second type of surveillance is targeted surveillance. This surveillance occurs when the government *suspects* an individual is guilty of a crime and the government engages in surveillance for the purpose of discovering evidence of the crime. In many instances, the government must obtain a warrant to conduct the surveillance or at least have some reasonable justification for doing so.

Although issues related to mass surveillance provided the impetus for Snowden's disclosure, Greenwald's book, and a substantial amount of other material currently published on the topic, plans that address issues related to surveillance based on individualized suspicion are certainly topical. While (nearly) everyone agrees surveillance based on individual suspicion is legitimate, there is controversy over what *standards* should govern surveillance in particular instances. This leaves plenty of room to make arguments that surveillance should be curtailed in specific instances of individual suspicion by establishing standards that make it legally more difficult to conduct. For example, affirmative teams may argue police need to establish "probable cause" before conducting surveillance in a specific instance, rather than "reasonable suspicion," which is a lower standard.

It is also important to note that, while surveillance is usually conducted for the purpose of preventing crime and stopping terrorism, the government engages in other types of surveillance, such as public health surveillance to prevent the spread of diseases. While this has obvious potential benefits, it can be critiqued as being biopolitical, a popular kritik argument in debate:

> According to the Foucauldian problematic of biopoliticized security, surveillance can be understood as the very form of liberal govemmentality seeking maximum efficiency for the regulation of bodies and species. It is an activity undertaken both by governments and institutions and even by the subjects themselves against each other.[1]

There will be an important topicality debate as to whether or not topical cases can address more than the surveillance of people. Limiting curtailments of surveillance to those involving people may produce the best balance of affirmative and negative ground while still producing a reasonable topic to debate.

Curtail means "to reduce in extent or quantity; impose a restriction on" (Google Definitions). There are two important parts of this definition.

First, the surveillance can be directly reduced. In other words, the U.S. federal government could just decide to reduce surveillance in a particular way by eliminating a certain surveillance program or programs.

Second, *curtail* means to "impose a restriction on." This means that the affirmative plan could also impose a restriction or type of regulation on how the surveillance is conducted to make it more difficult to execute. For example, the plan might require a warrant for surveillance in instances where no warrant is currently required.

Both direct reductions and restrictions are advocated in the literature.

Its means "of or relating to it or itself especially as *possessor*, agent, or object of an action" (Merriam Webster). The presence of "its" in the resolution is significant because the only directly topical advocacy is for the U.S. federal government to reduce its surveillance, not to act to reduce the surveillance of other entities.

This is significant because state and local police forces engage in surveillance, especially surveillance that occurs as a result of individual suspicion; *most* policing is conducted by state and local authorities, not federal authorities. Under the resolution, however, the federal government can't restrict state or local surveillance, only its own surveillance. In turn, the federal government could restrict surveillance conducted by any federal authority—such as the NSA, the Immigration and Naturalization Service (INS), the Drug Enforcement Agency (DEA), or any other federal agency.

One exception to this would be the *indirect* effect of restricting state/local police surveillance as a result of a plan that argues a certain type of surveillance conducted by the federal government was *unconstitutional*. If it was unconstitutional for the federal government to engage in it (which is what the plan would say), then it would be unconstitutional for state/local governments to engage in it, as well. So, the plan would topically curtail federal government surveillance, and then curtail state government surveillance by effect.

A second exception to this is any program that involves federal and state surveillance cooperation. For example, the DEA supports local and state drug enforcement operations.[2] If federal support is curtailed, these local and state operations may cease to function, or at least cease to work well.

Domestic means "existing or occurring inside a particular country; not foreign or international" (Google Definitions). Although the NSA engages in surveillance outside the U.S., and that surveillance is very controversial, it was necessary to add the term "domestic" to the resolution. Otherwise, topical affirmative cases would have included actions like reducing spying in particular countries or preventing the collection of intelligence by drones that support military operations against the Islamic State of Iraq and the Levant (ISIL, aka ISIS). Since this would have expanded the topic way beyond what it was intended to include, it was essential to add the word "domestic" to the topic.

Although the term "domestic" does seem rather straight-forward, it is complicated in the context of certain affirmative cases. First, it is complicated because surveillance of foreign targets often occurs by monitoring calls and emails as they pass through U.S. domestic servers.

> The report also filled in a gap about the evolving legality of the warrantless wiretapping program... to direct the NSA to collect Americans' international phone calls and emails, from network locations on domestic soil, without the individual warrants required by the Foreign Intelligence Surveillance Act, or FISA... Judge Vinson's resistance led Congress to enact, in August 2007, the Protect America Act, a temporary law permitting warrantless surveillance of foreigners *from domestic network locations*.[3]

Although the temporary Protect America Act was replaced with the more permanent Foreign Intelligence Surveillance Act of 2008, this provision remains.

Second, in the context of surveillance legislation, *foreign* and *domestic* often refers to the *target* rather than the *location*. So, foreigners can be monitored in the U.S. without any legal restraints. While this creates more potential to blur the domestic/foreign distinction, negative teams should use definitions like that above to argue *domestic* refers to "inside a particular country." It is very important for the negative to hold this line to prevent a radical expansion of the topic.

Substantially is usually defined as "in the main" or as "real worth or importance." Other definitions that are drawn from Words & Phrases and deal with examples from specific court cases offer percentages—5% is substantial, 10% is substantial, 50% is substantial, etc.

The point here is not to rehearse all of the different meanings of substantial or to discuss all possible violations, but merely to point out that the curtailment the affirmative proposes will need to be significant; certainly more than very small. Ensuring that the reduction is substantial and non-trivial sustains negative ground by making sure there are realistic links to disadvantages such as Terrorism and Executive Power.

The wording of the resolution does capture the heart of the controversy related to the expansion of government authority and activity in the area of mass surveillance. As written, the resolution does not allow the affirmative to access most foreign surveillance elements, but since there is some overlap between domestic and foreign surveillance in some areas, affirmative cases will be able to access it to a limited degree.

Although the topic does capture the heart of the current mass surveillance controversy, it also opens topical discussion to standards that govern surveillance based on individual suspicion. The standards governing targeted surveillance of suspicious individuals is largely a separate body of literature, but it overlaps the mass surveillance literature to some degree. Often the same standards that are advocated for mass surveillance argue the government should shift back toward more suspicion-based surveillance of individuals, based on certain standards that are already debated in the individual suspicion literature.

Although there is a lot of potential distinct affirmative ground in the area of targeted surveillance, the practical size of the topic is limited by the fact that most of this surveillance is conducted at the state and local levels. Affirmatives who primarily target state and local police surveillance policies by issuing court rulings against federal action that would effectually apply to state and local law enforcement will have a lot of their affirmative harms solved by state and local action counterplans. These cases, while available, are not especially strategic, which means that most of the cases will focus back on the question of mass surveillance, something in which the federal government is heavily involved.

Before moving on to the Advantage section of this essay, I do want to highlight a couple of important points about the nature of the resolution and the issue of whether or not topicality is a voting issue. Recently, a growing number of teams have been challenging the claim that topicality is a voting issue with two basic arguments—(a) they shouldn't have to defend the United States federal government, which they consider to be an "inherently racist" actor, and (b) the topic is not of any interest or relevance to them.

These two arguments seem especially weak in the context of this resolution. First, the affirmative can argue for a *net reduction* in U.S. government action. They do not have to topically defend U.S. government action at all; their curtailment can simply reduce surveillance conducted by the federal government without issuing a new standard to govern it. Any alternative advocated by the negative of zero government would necessarily include the federal government reducing its surveillance powers in the way advocated by the affirmative. Second,

the U.S. government is engaging in *mass surveillance*—conducting call metadata on every cell phone in the U.S., for example, and arguably also collecting metadata on Internet browsing and email communication. This topic is relevant to the life of *anyone* who has a phone, has an email account, and/or browses the Internet.

The Advantages

In this section, I will discuss the advantages that commonly stem from action to reduce surveillance. I think it is important to discuss these first, both because they contextualize the value of the plans that will be discussed in the next section and also because, while there are many different plans, there are only so many advantages. Teams who are prepared to debate the advantages and win a disadvantage can usually win on "DA outweighs," even if they don't have arguments against the specific solvency mechanism.

Privacy. There are many different ways to understand "privacy," an idea originally articulated by Samuel D. Warren and Louis D. Brandeis in 1890.[4] These include the right to be left alone, the right to be secure in one's person, the right to have certain information about one kept secret, the right to be free from interference, the right to make personal (including intimate) decisions, and the right to associate with who one wishes without interference.[5]

The threat to privacy from any type of surveillance is significant because it involves monitoring of individuals, meaning that certain information about them will not be kept secret.

> The continuous and indiscriminate surveillance they accomplish is damaging because it violates reasonable expectations of quantitative privacy, by which we mean privacy interests in large aggregations of information that are independent from particular interests in constituent parts of that whole... But rather than being a function of the kind of information gathered, we think that the true threats to projects of self-development and democratic culture lie in the capacity of new and developing technologies to facilitate a surveillance state... [B]y "making available at a relatively low cost such a substantial quantum of intimate information about any person whom the government, in its unfettered discretion, chooses to track," programs of broad and indiscriminate surveillance will "chill associational and expressive freedoms," and "alter the relationship between citizen and government in a way that is inimical to a democratic society." Privacy is just beginning to receive recognition because it is only now under threat of extinction by technologies like Virtual Alabama and fusion centers.[6]

Beyond the harms caused by individual privacy violations, including the loss of human dignity, surveillance laws lay the foundations for totalitarianism. Surveillance makes totalitarianism possible by discouraging intellectual exploration of controversial ideas and creating a power relationship between the government and the person who is subject to surveillance.

> From the Fourth Amendment to George Orwell's *Nineteen Eighty-Four*, and from the Electronic Communications Privacy Act to films like *Minority Report* and *The Lives of Others*, our law and culture are full of warnings about state scrutiny of our lives... But these warnings are no longer science fiction. The digital technologies that have revolutionized our daily lives have also created minutely detailed records of those lives... [W]e recently learned that the National Security Agency (NSA) has been building a massive data and supercomputing center in Utah, apparently with the goal of intercepting and storing much of the world's Internet communications for decryption and analysis... [O]ur law of surveillance provides only minimal protections. Courts frequently dismiss challenges to such programs for lack of standing, under the theory that mere surveillance creates no harms... First, surveillance is harmful because it can chill the exercise of our civil liberties. With respect to civil liberties, consider surveillance of people when they are thinking, reading, and communicating with others in order to make up their minds about political and social issues. Such intellectual surveillance is especially dangerous because it can cause people not to experiment with new, controversial, or deviant ideas... A second special harm that surveillance poses is its effect on the power dynamic between the watcher and the watched. This disparity creates the risk of a variety of harms, such as discrimination, coercion, and the threat of selective enforcement, where critics of the government can be prosecuted or blackmailed for wrongdoing unrelated to the purpose of the surveillance... Government surveillance of the Internet is a power with the potential for massive abuse... Surveillance menaces intellectual privacy and increases the risk of blackmail, coercion, and discrimination; accordingly, we must recognize surveillance as a harm in constitutional standing doctrine.[7]

Heidi Boghosian reaches similar conclusions.[8]

The NSA doesn't have a great track record when it comes to limiting abuse of its authority. During the Vietnam War, the NSA spied on Mohammed Ali, Martin Luther King, and Senator Howard Baker. Arab American lawyer Abdeen Jabara was also spied on. In March 2013, the NSA program, Boundless Informant, collected 97 billion pieces of metadata. From 1940 to 1973, the Central Intelligence Agency (CIA) and Federal Bureau of Investigation (FBI) engaged in a covert mail opening program. The Army intercepted domestic radio communications, placing more than 100 people under surveillance.

Freedom of association/expression. Surveillance discourages individuals from freely associating and expressing their opinions, because the opinions may be being monitored by authorities.

> *Osborn v. United States, 385 U.S. 323, 341 (1966)* (Douglas, J., dissenting); see also *United States v. Jones, 132 S. Ct. 945, 956 (2012)* (Sotomayor, J., concurring) ("Awareness that the government may be watching chills associational and expressive

freedoms. And the government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse)... ("Official surveillance...risks infringement of constitutionally protected privacy of speech. Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent.")[9]

Racism. Racism is a very complex issue that has been the subject of extensive debating, particularly in the Policy and Lincoln-Douglas Debate formats, and this topic lends itself to extensive debates about race, as different types of surveillance are often directly or indirectly targeted at minorities.

In the area of mass surveillance, many argue that NSA surveillance is illegitimately targeted at minorities, particularly Arab and Muslim minorities. In July of 2014, the *Intercept*, Glenn Greenwald's new magazine/website, published the email addresses of more than 7,000 Muslim-Americans who are under warrantless surveillance.

> The NSA and FBI have covertly monitored the emails of prominent Muslim-Americans—including a political candidate and several civil rights activists, academics, and lawyers—under secretive procedures intended to target terrorists and foreign spies. According to documents provided by NSA whistleblower Edward Snowden, the list of Americans monitored by their own government includes:
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> - Faisal Gill, a longtime Republican Party operative and one-time candidate for public office who held a top-secret security clearance and served in the Department of Homeland Security under President George W. Bush;
> - Asim Ghafoor, a prominent attorney who has represented clients in terrorism-related cases;
> - Hooshang Amirahmadi, an Iranian-American professor of international relations at Rutgers University...
>
> The individuals appear on an NSA spreadsheet in the Snowden archives called "FISA recap"—short for the Foreign Intelligence Surveillance Act. Under that law, the Justice Department must convince a judge with the top-secret Foreign Intelligence Surveillance Court that there is probable cause to believe that American targets are not only agents of an international terrorist organization or other foreign power, but also "are or may be" engaged in or abetting espionage, sabotage, or terrorism. The authorizations must be renewed by the court, usually every 90 days for U.S. citizens. The spreadsheet shows 7,485 email addresses listed as monitored between 2002 and 2008. Many of the email addresses on the list appear to belong to foreigners whom the government believes are linked to Al Qaeda, Hamas, and Hezbollah.[10]

Other articles reach similar conclusions.[11]

Monitoring based on race and ethnicity is not limited to NSA programs.

> Picture this: you live in a society in which the government is allowed to partake in intrusive surveillance measures without the institutionalized checks and balances upon which the government was founded. In this society, the government pursues citizens who belong to a particular race or ethnicity, practice a certain religion, or have affiliations with specific interest groups. Individuals who have these characteristics are subject to surreptitious monitoring, which includes undercover government officials disguising themselves as community members in order to attend various community events and programs. The government may also place these individuals on watch lists, even where there is no evidence of wrongdoing... This "hypothetical" society is not hypothetical at all; in fact, it is the current state of American surveillance... This fear has resulted in governmental intelligence efforts that are focused on political activists, racial and religious minorities, and immigrants. The government's domestic surveillance efforts are not only geared toward suspected terrorists and those partaking in criminal activity, but reach any innocent, non-criminal, non-terrorist national, all in the name of national security. The government's power to engage in suspicionless surveillance and track innocent citizens' sensitive information has been granted through the creation and revision of the National Counterterrorism Center and the FBI's Domestic Investigations and Operations Guide. The grant of surveillance power has resulted in many opponents, including those within the current presidential administration, who challenge the order for numerous reasons... Surveillance practices, such as posing as members of the community and placing individuals on watch lists without suspicion of terrorist activity, result in the impermissible monitoring of individuals on the basis of their race or ethnicity. These practices, although done in the name of national security, an established compelling government interest, violate the Equal Protection Clause of the Fourteenth Amendment because they are not narrowly tailored to the stated interest.[12]

Arun Kudnani[13] and Trevor Aaronson[14] argue the FBI uses thousands of informants to spy on Muslim communities, looking for radical elements.

At the local level (in New York), police are engaging in surveillance practices targeted at gangs now that they cannot engage in stop-and-frisk practices.

> After a federal judge ruled stop-and-frisk unconstitutional, and Bill de Blasio triumphed in the Democratic mayoral primary in part by running against Mayor Bloomberg's favorite police tactic, the NYPD was forced to come up with a new plan. *The New York Times* is reporting that the NYPD has apparently pumped up their social media monitoring as a tactic to essentially replace stop-and-frisk... The NYPD reported claims that people involved in gang activity often threaten people or boast about their various illicit activities on the social media platform, which gave the department the ability to thwart a potentially violent incident earlier this year... This is sure to prompt the already loaded questions regarding

> Internet privacy and government surveillance, and it would seem to run the risk of ensnaring harmless teenagers who just might post something dumb, but not truly threatening. But for now, the NYPD is going full tilt on the new surveillance technique.[15]

Internet freedom. U.S. surveillance practices undermine U.S. credibility on promoting freedom of the Internet. This will result in even greater restrictions in countries like Russia and China.

> In the court of global public opinion, America may have tarnished its moral authority to question the surveillance practices of other nations—whether it be Russia on monitoring journalists, or China on conducting cyber espionage. Declarations by the State Department that were once statements of principle now ring hollow and hypocritical to some. No nation can rival the American surveillance state, but they no longer need support to build their own massive systems of espionage and oppression... Diplomatic pressures and legal barriers that had also once served as major deterrents will soon fade away. The goal has been *to promote Internet freedom around the world*, but we may have also potentially created a blueprint for how authoritarian governments can store, track, and mine their citizens' digital lives.[16]

Other evidence does tie the loss of Internet freedom to the loss of freedom and democracy generally.

Economy. The link to this advantage stems from mass surveillance activities by the U.S. federal government. The argument is that foreign companies and countries no longer want to do business with U.S. Internet companies because information on their citizens is turned over to and held by the NSA.

Arvind Ganesan of Human Rights Watch wrote in 2013:

> But the impact on U.S. technology companies and a fragile American economy may be even greater. Every new revelation suggests far more surveillance than imagined and more involvement by telephone and Internet companies, with much still unknown. One of the most troubling aspects of this spying is that foreign nationals abroad have no privacy rights under U.S. law. Foreigners using the services of global companies are fair game... A July 1 report by *Der Spiegel* on the NSA spying on European officials infuriated governments a week before negotiations started on a massive U.S.-European Union trade agreement that could be worth almost $272 billion for their economies and two million new jobs... For the Internet companies named in reports on NSA surveillance, their bottom line is at risk because European markets are crucial for them... Europe was primed for a backlash against NSA spying because people care deeply about privacy after their experience of state intrusion in Nazi Germany and Communist Eastern Europe. And U.S. spying on Europeans via companies had been a simmering problem since at least 2011. In June 2011, Microsoft admitted that the United States could bypass E.U. privacy regulations to get vast amounts of cloud data from their European customers. Six months later, BAE Systems, based in the United Kingdom, stopped using the company's cloud services because of this issue.[17]

Executive power abuse. Current federal surveillance practices arguably exceed the authority of the Commander-in-Chief and affirmative teams can argue that this assertion of executive power is tyrannical.

> But warrantless surveillance of Americans inside the United States, who may have nothing to do with al-Qaeda, does not qualify as incidental wartime authority. The President's war powers are broad, but not boundless... But third, where the president takes measures incompatible with the express or implied will of Congress—such as the NSA program, which violates an express provision of the FISA statute—"his power is at its lowest"... belongs in the third category, in which the President has acted in the face of an express statutory prohibition..., but Congress, exercising its own concurrent wartime powers, has limited the scope of that authority by excluding warrantless surveillance intentionally targeted at a U.S. person in the United States.[18]

Soft power and hegemony. Some affirmative teams may argue reducing mass surveillance will improve the U.S. image in the world—its "soft power."

> Many of those who are optimistic about the ability of the U.S. to pull off this project of declining power without declining influence place emphasis on two things: the extent to which the U.S. has soft power due to widespread admiration for its political and cultural values, and the extent to which it has locked in influence through the extent of its existing networks of friends and allies... It will be difficult to maintain the allure of soft power if global opinion settles on the view that American political discord has rendered its democracy dysfunctional at home, or that its surveillance practices have given rein to the mores of a police state.[19]

U.S. soft power can be valuable in facilitating global diplomacy necessary to arrest environmental problems, slow nuclear proliferation, and mediate global disputes. By strengthening allied relationships, it can also support U.S. hard power.

Infopolitics. Infopolitics is a relatively new concept; I don't think it has been run as an advantage in debate yet, so I'm not sure how it will play out, but the basic idea is that people are being defined by the data they represent and that is bad. Restricting the collection of the data would restrict the development of this identity.

> We are in the midst of a flood of alarming revelations about information sweeps conducted by government agencies and private corporations concerning the activities and habits of ordinary Americans... We do not like to think of ourselves as bits and bytes. But if we don't, we leave it to others to do it for us... What we need is a concept of infopolitics that would help us understand the increasingly dense ties between politics and information. Infopolitics encompasses not only

traditional state surveillance and data surveillance, but also "data analytics"... Surveying this iceberg is crucial because atop it sits a new kind of person: the informational person. Politically and culturally, we are increasingly defined through an array of information architectures: highly designed environments of data, like our social media profiles, into which we often have to squeeze ourselves... Our minds are represented by psychological evaluations, education records, credit scores. Our bodies are characterized via medical dossiers, fitness and nutrition tracking regimens, airport security apparatuses. We have become what the privacy theorist Daniel Solove calls "digital persons." As such we are subject to infopolitics... When all that paper ultimately went digital, the reams of data about us became radically more accessible and subject to manipulation, which has made us even more informational... What would be left of you if someone took away all your numbers, cards, accounts, dossiers, and other informational prostheses? Information is not just about you—it also constitutes who you are... They understand that information is a site for the call of justice today, alongside more quintessential battlefields like liberty of thought and equality of opportunity.[20]

Biopower/biopolitics. Biopower is power of the state over individuals that is achieved through the regulation of everyday life. Public health surveillance for the purpose of preventing the spread of disease and generally improving health is a manifestation of such biopower.

> With the increasing uncertainties of a post-September 11 world, the issue of surveillance is given renewed importance through the discourses surrounding the proliferation of "control" technologies and the rhetoric of (in)security pervading contemporary politics. Electronic technologies are seen to be intensifying the "capacity" and ubiquity of surveillance creating "new" forms of social control... Examples of these technologies include DNA fingerprinting, electronic tagging, drug testing, health scans, biometric ID cards and passports, smart closed circuit television, etc., all of which rely on algorithmic techniques as well as "body parts" in order to perform their function of surveillance... [T]his paper will be mainly concerned with one specific aspect of surveillance and its relation to biopolitics and the ways in which surveillance stands as the emblem of the magnitude and dimension of that which constitutes the management of life and death.[21]

Securitization. Securitization is a popular kritik that argues it is bad to justify action based on the logic of security because that can lead to the hyping of threats, military intervention, war, and the displacement of democracy as the trumped security threat squeezes out rational debate on any security issue. Rationales for surveillance are embedded in this securitization logic, and if the affirmative wins this advantage, it automatically challenges (and turns) the impact claim of the disadvantage.

> Threat inflation is a concept in political science whereby elites will create concern for a threat which goes way beyond what is required. "When a threat is inflated, the marketplace of ideas on which a democracy relies to make sound judgements—in particular, the media and popular debate—can become overwhelmed by fallacious information" (Brito & Watkins, 2011, p. 2). In the article by Brito & Watkins parallels are made between the threat inflation of the cyber debate and the Iraq war. The Bush administration sought popular support for war by providing information that was later proved completely baseless... and the most vocal proponents of a threat engage in rhetoric that can only be characterized as alarmist (Brito & Watkins, 2011, p. 7). Censorship and surveillance has increased greatly in recent years. Many forms of surveillance are now common practice across many states. Following the September 11th terrorist attacks in the United States, countries have drafted bills which have included different surveillance-related proposals. "These Bills contained a host of proposals designed to address future terrorist threats through changes to policing, the military and public administration" (Haggery & Ericson, 2000, p. 175)... The shift toward censorship, surveillance, and the securitization of cyberspace is very well connected. "Internet filtering is increasingly accepted worldwide, companies have imposed heavy-handed copyright controls, and surveillance in both the public and private sectors is widespread" (Deibert, 2012). Tethered appliances have the potential to be used as great sources of surveillance and control. "Apple doesn't monitor emails sent over your iPhone, but could; TiVo, the television-recording device, routinely inform headquarters of what you've been watching" (Burkeman, 2008). Securitization of cyberspace is a threat to the modern liberal democracy. Any major change to the control of the Internet away from the laissez-faire approach would be particularly damaging.[22]

Plans/Cases

In this section, I will review some ideas for plans/proposals that reduce mass surveillance. There is a greater emphasis on mass surveillance conducted by the federal government because I have done more work in that area to date.

Federal mass surveillance. Some of the proposals for curtailing mass surveillance focus on limits that would apply to (nearly all) federal programs. Other suggested curtailments are program specific. Some of both types will be reviewed.

Anderson (2014) recommends "amending FISA" (the Foreign Intelligence Surveillance Act) in order to "narrow the scope of surveillance discretion granted to intelligence agencies," "strengthen(ing) the ability of courts, Congress, and the American public to check abuses in surveillance authority exercised by the executive branch" and "codify[ing] some of the President's promises that offer to expand civil liberties protections, particularly the newly announced minimization procedures and the promise not to use the NSA to target domestic racial minorities or political dissidents... Additionally, Congress should narrow the type of activity that constitutes reasonable suspicion by an intelligence agency that a U.S. person is an "agent of a foreign power... Third, Congress should modify Section 1881a so that it explicitly states that any collateral data on U.S.

persons collected by intelligence agencies cannot be used for intelligence purposes without specific FISC authorization."[23]

Rushin (2013) supports Supreme Court Justice Samuel Alito's proposal that "the Court should look at surveillance techniques on a case-by-case basis and judge whether the electronic surveillance used 'involved a degree of intrusion that a reasonable person would not have anticipated.' The Alito recommendation is similar to the proposal I made two years ago. His solution would involve the judiciary limiting the length of data retention for surveillance technologies. He would permit longer retention in cases where police are investigating serious criminal offenses. And he emphasizes that the legislature may be the most appropriate branch to regulate these technologies long-term... Both my recommended solution and Alito's represent a limited acceptance of the so-called mosaic theory that recognizes that the aggregation of long-term electronic surveillance data can be so revealing of personal details as to become an unreasonable search or seizure. Both my recommended solution and Alito's represent a limited acceptance of the so-called mosaic theory that recognizes that the aggregation of long-term electronic surveillance data can be so revealing of personal details as to become an unreasonable search or seizure."[24]

Reidenberg (2014) offers similar suggests for limiting the extent of mass private records access by law enforcement: "Red line boundaries should include (1) retention limits that, without a compelling justification specific to a target, do not go beyond a duration required for billing; (2) a ban on access without independent, public judicial oversight; and (3) no cross sharing between intelligence and law enforcement or between law enforcement and economic rights enforcement. These boundaries will need to be established in both national law and international agreements."[25]

Shaina Kalanges (2014) notes, "Congress proposed nearly 30 pieces of legislation to tackle the exposed NSA program issues with the surveillance process, lack of transparency, and interaction with the FISC [Foreign Intelligence Surveillance Court]" and argues for enhanced role of an intelligence Inspector General of the Intelligence Community "who will assess the NSA's programs and system rules with security of domestic privacy rights in mind. This includes evaluating the boundaries set out in subsections (b), (d), (e), and (f) of the law pertaining to surveillance of United States citizens and the application of those boundaries."[26]

Daniel Byman (2014) argues for greater transparency and some increase restrictions.[27] He also references Sensenbrenner's proposal—the USA Freedom Act—to end metadata collection, publicize any policy changes, and allow phone companies to publicly state how many government requests are received for information. He argues the Freedom Act "allows FISC judges to evaluate fulfillment of minimization requirements by examining the conditions surrounding the acquisition, storage, or distribution of data pertaining to U.S. citizens, either prior to or after approval or 'extension' of a 'pen register or trap and trace device' and calls for 'comprehensive audits of the effectiveness and use, including any improper or illegal use, of pen registers and trap and trace devices under title IV of the Foreign Intelligence Surveillance Act of 1978.'"[28] See also: *Time Magazine*,[29] Center for Democracy & Technology.[30]

Orin Kerr (2014) argues, "Congress should improve the surveillance laws by making sure the FISC will not act as a lawmaking court. Congress should enact an interpretive rule directing that government powers granted under the Foreign Intelligence Surveillance Act ("FISA") should be narrowly construed. I will call this rule of narrow construction a "rule of lenity..." When the government's power under existing law is ambiguous, the FISC should adopt the narrower construction that favors the individual instead of the State... Adopting a rule of narrow interpretation for national security surveillance law would have three important benefits. First, it would promote democratic accountability and transparency... Second, a narrow interpretive approach would shift power to the branch of government best suited to balance privacy and security in changing technologies... Finally, a rule of narrow interpretation would avoid the difficult conceptual and constitutional issues raised by existing proposals that try to make the FISC more like a regular court.[31]

Butler (2013) references a proposal by Senators Wyden and Udal that would prohibit the government "from searching the contents of the communications of U.S. persons without a search warrant."[32]

Kirill Levashov (2013) supports a proposal by Senator Al Franken that "called on Facebook and the FBI to change the way they use facial recognition technology... Franken asked the U.S. Federal Trade Commission 'to require private companies to get permission before identifying a person with facial recognition... Only when a faceprint is the sole biometric identifier by which the stated goal can be achieved should collection be permitted... The sources from which a faceprint can be collected could be restricted. In most cases, faceprints should be collected directly from the individual, and collection from social networks, government agencies, or other third parties should be treated with extreme skepticism. Further, each faceprint should have an established 'shelf life'—a length of time for which it may be kept.'"[33]

There are some different proposals for dealing with federal access to the business records program, especially the cell phone records under Section 215.

The Privacy & Civil Liberties Oversight Board (2014) argues the program should be eliminated.[34]

Monu Bedi (2014) argues "the information [should be left] in the hands of the private companies and obtaining court orders to conduct metadata surveillance. President Obama went along with this suggestion and ordered the NSA and the attorney general to work toward figuring out a way to continue the dragnet telephony metadata program without the government storing all of the domestic and foreign data."[35] [Note: Obama recently backed off this suggestion.]

Matthatias Schwartz (2015) references more than 40 different proposed changes,[36] including some unrelated to Section 215.

Although a warrant is not required to collect the information, at least a warrant is required to search it. The one exception to this is National Security Letters (NSL), which is authorized

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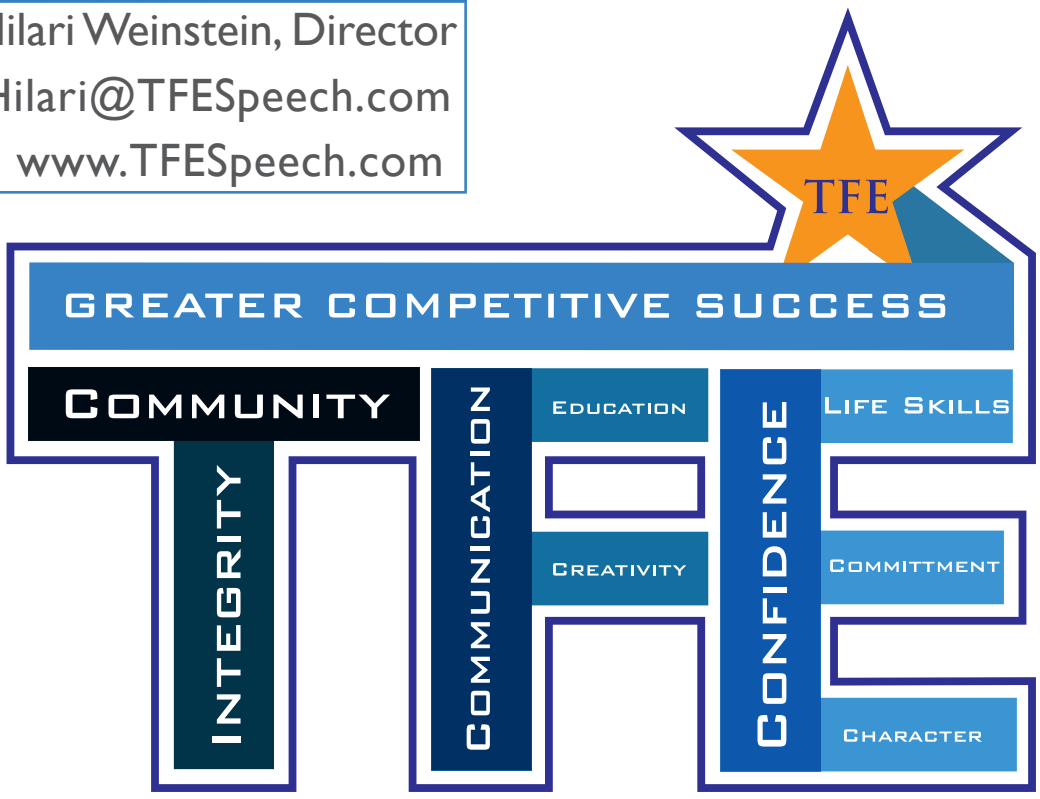

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under Section 505 of the PATRIOT Act. If the government uses an NSL, a demonstration of probable cause necessary to obtain a warrant is not required. Advocates such as Jaffer (2013, cited next) argue for the abolition of the NSL.

Section 702 of the PATRIOT Act is less controversial than Section 215 because it targets foreigners, but "the content of communication" of Americans is "swept up" when communication of foreigners is monitored. This information is collected without a warrant.[37] This information is stored in a database called PRISM. Jaffer (2013) argues that this surveillance should be at least subject to a warrant requirement.[38]

Information about Americans is "inadvertently" swept up when targeting foreigners not only under Section 702 authority, but under Executive Order 12333. This order, titled United States Intelligence Activities, gives the Attorney General the power to approve the use of surveillance techniques so long as he or she determines those techniques are "directed against a foreign power or an agent of a foreign power."[39] Although a warrant is required to gain access to information on Americans, this indiscriminate mass surveillance often occurs.

> Undoubtedly, the NSA's mass surveillance conducted under 12333 captures huge amounts of data unrelated to the mission of national security, including information on millions of Americans. Although 12333 requires a court order to target a United States Person, this is of little comfort. Given the global nature of communications, the indiscriminate mass surveillance the NSA conducts overseas captures the information of United States persons. Furthermore, the government can use and share this information without any order from a judge or oversight from Congress.[40]

The MYSTIC and RETRO programs allow for the collection of all of a foreign country's phone calls and emails, and some claim the NSA has directly tapped into companies such as Yahoo and Google data centers located around the world to collect this data. Data on Americans is at least inadvertently captured through this process.

One interesting and especially strategic case deals with encryption. Encryption technology is designed to provide a secure method of communication between individuals. In order to protect its surveillance capabilities, the federal government often attempts to crack encryption. Although this supports surveillance efforts, it also weakens Internet security.

> The NSA has done serious damage to Internet security through its weakening of key encryption standards, insertion of surveillance backdoors into widely-used hardware and software products, stockpiling rather than responsibly disclosing information about software security vulnerabilities and a variety of offensive hacking operations undermining the overall security of the global Internet.[41]

Other sources reach similar conclusions.[42]

Plans that apply to all criminal law enforcement. There are many advocates for plans that apply to all law enforcement (local, state, federal).

Olivier Sylvain (2014) argues for a strengthened role of the courts in enforcing a new, stronger privacy standard[43] to guard against problematic surveillance. Monu Bedi (2014) argues that the protection of "associational rights" should be incorporated into this privacy standard.[44]

Susan Freiwald and Sylvain Metille (2013) argue the U.S. should adopt a law modeled on the Swiss CrimPC that "prohibits the use of surveillance without authorization and treats any information gathered by such surveillance as illegally obtained and subject to the exclusionary rule when challenged by the subject. In addition, officials who conduct surveillance in violation of CrimPC risk disciplinary measures and prosecution."[45]

The use of drone surveillance for law enforcement is growing and is likely to rapidly expand.[46] Victoria T. San Pedro (2014) contends, "Congress should enact legislation that prescribes a time limit on the duration of [drone] surveillance... A statutory, bright-line rule requiring a warrant for long-term drone surveillance—defining an acceptable period for such surveillance—removes law enforcement's discretion from the equation and ensures that law enforcement receives the proper guidance to determine situations requiring a warrant. Further, such rules limit law enforcement's ability to conduct long-term surveillance at the expense of an individual's privacy rights."[47] Yang (2014) argues for similar rules.[48]

The FBI maintains a CODIS database designed to store all of the DNA profiles that have been collected through participating laboratories. Kelly Ferrell (2013) states, "Congress should amend the federal legislation by: (1) explicitly requiring the automatic deletion of the sample upon dismissal of charges; (2) postponing the creation of the DNA profile from the DNA sample until the arrestee is convicted; and (3) mandating that DNA samples be immediately deleted following the creation of the DNA profile. By passing the aforementioned amendments, Congress will safeguard the genetic privacy rights of unconvicted citizens and reduce the workload of forensic laboratories to a manageable level."[49]

Stone (2015) argues for requiring a warrant before law enforcement engages in geolocation tracking.[50]

While these standards can be topically applied to federal law enforcement activities, it is probably not topical, or at least it would be extra topical, for *Congress* to apply these standards to *all* law enforcement. The reason is that it is only topical under the resolution for the federal government to curtail *its* domestic surveillance, and if Congress passes legislation that applies to non-federal actors, that isn't topical. As discussed above, the one exception to this is court rules; if the courts require the application of a particular standard to a federal policing program for constitutional purposes, that same standard would effectually apply to state and local police practices.

Federal law enforcement practices. There are some suggestions for reforms of surveillance practices conducted by federal law enforcement in the area of targeted law enforcement. These include changes in airport screening[51] and border security:[52]

> A major aspect of the Secure Border Initiative is SBInet, which consists of a network of surveillance towers with radar and cameras. In September 2006 the Boeing Corporation won the $70

> million Department of Homeland Security contract to develop and build the towers and monitor its subcontractors. Putting these into practice involves Boeing personnel in the actual monitoring of the border. As the various surveillance mechanisms, from agents to high-tech equipment, have been put into place, they have collectively contributed to the increase in migrant deaths.[53]

The federal government is also actively involved in surveillance in the war on drugs.

> The U.S. Department of Justice has begun reviewing a controversial unit inside the Drug Enforcement Administration that uses secret domestic surveillance tactics—including intelligence gathered by the National Security Agency—to target Americans for drug offenses. According to a series of articles published by Reuters, agents are instructed to recreate the investigative trail in order to conceal the origins of the evidence, not only from defense lawyers, but also sometimes from prosecutors and judges. "We are talking about ordinary crime: drug dealing, organized crime, money laundering. We are not talking about national security crimes," says Reuters reporter John Shiffman. Ethan Nadelmann, executive director of the Drug Policy Alliance, says this is just the latest scandal at the DEA. "I hope it is a sort of wake-up call for people in Congress to say now is the time, finally, after 40 years, to say this agency really needs a close examination."[54]

The war on drugs is a very controversial issue and curtailing it has always been a strong case. Given the strength of these cases and that they directly access debates about race, these are likely to be quite popular.

Disadvantages

There are a number of common disadvantages that link to many (if not all) of the affirmatives plans on this topic.

Presidential politics. There is substantial political opposition to both reforming surveillance and to making it more difficult for the police to fight crime.

Due to the fear of terrorism, there has always been at least some substantial opposition to efforts to reform surveillance. This political opposition has just increased in light of the attacks in Paris.

> The push to reform the National Security Agency isn't getting any easier. [A] reform bill was narrowly blocked on the Senate floor late last year… But the attacks in Paris last week, where gunmen killed 12 at a satirical newspaper and four at a kosher market, is making that job harder, and strengthening the resolve of the NSA's backers. "I hope the effect of that is that people realize… the pendulum has swung way too far after [leaker Edward Snowden]," Senate Foreign Relations Chairman Bob Corker (R-Tenn.) told reporters on Thursday. "…Yet the more time that passes since Snowden's leaks, the more the public's anger over the spy agency's operations has dimmed. Incidents like the Paris attacks make any attempt to rein in the agency a harder political sell. "…The Paris attacks are only the latest foreign events to interject itself in the congressional debate over the NSA…News about ISIS hurt the effort to reform the NSA last autumn…[55]

Reducing surveillance of non-terrorist criminals would be perceived as soft-on-crime and politically suicidal.

> Furthermore, state correctional budgets do not appear to have been affected by recent budget shortfalls. Despite anecdotal evidence to the contrary, the political climate created by law-and-order politics—where being perceived as "soft on crime" is the equivalent of political suicide—is alive and well.[56]

Election politics. With the 2016 election around the corner in the fall of 2016, Presidential election disadvantages will certainly be popular on the topic. Negative teams will argue the plan makes either the Democratic or Republican candidate more or less likely to win the election and they will argue why it is good for that candidate to win.

Terrorism. The primary objection to restricting government surveillance, especially mass surveillance, is that surveillance is necessary to prevent terrorism (and the largest, "nuclear terrorist attack" impacts are often referenced).

There are people who say a strong intelligence capability (that is enhanced through mass surveillance) is also necessary to prevent nuclear proliferation (the spread of nuclear weapons), position military forces, and conduct effective negotiations.

> The real problem with FISA, and even the PATRIOT Act, as they existed before the 2008 Amendments, is that they remained rooted in a law enforcement approach to electronic surveillance… Searches and wiretaps had to target a specific individual already believed to be involved in harmful activity. But detecting al Qaeda members who have no previous criminal record in the United States, and who are undeterred by the possibility of criminal sanctions, requires the use of more sweeping methods. To prevent attacks successfully, the government has to devote surveillance resources where there is a reasonable chance that terrorists will appear or communicate, even if their specific identities remain unknown… An approach based on individualized suspicion would prevent computers from searching through that channel for the keywords or names that might suggest terrorist communications because there are no specific al Qaeda suspects and thus no probable cause. Searching for terrorists depends on playing the probabilities rather than individualized suspicion, just as roadblocks or airport screenings do… Armies do not meet a "probable cause" requirement when they attack a position, fire on enemy troops, or intercept enemy communications…The primary objective of the NSA program is to "detect and prevent" possible al Qaeda attacks on the

> United States, whether another attack like September 11; a bomb in apartment buildings, bridges, or transportation hubs such as airports; or a nuclear, biological, or chemical attack. These are not hypotheticals; they are all al Qaeda plots, some of which U.S. intelligence and law enforcement agencies have already stopped. A President will want to use information gathered by the NSA to deploy military, intelligence, and law enforcement personnel to stop the next attack... Al Qaeda has launched a variety of efforts to attack the United States, and it intends to continue them. The primary way to stop those attacks is to find and stop al Qaeda operatives, and the best way to find them is to intercept their electronic communications.[57]

Cyberterrorism. Surveillance of the Internet is arguably necessary to prevent cyber attacks, either from terrorists or other governments. Rich Edwards, writing in *Forensic Quarterly*, explains;

> James Comey, the current director of the FBI, reports that surveillance capabilities are necessary in order to prevent cyber crime: "We want to predict and prevent attacks, rather than reacting after the fact. FBI agents, analysts, and computer scientists are using technical capabilities and traditional investigative techniques—such as sources and wires, surveillance and forensics—to fight cyber crime" (Comey, 2014, p. 14). Similarly, NSA Director Keith Alexander says that surveillance is necessary to prevent cyber terrorism: "Our analytic tools are effective at finding terrorist communications in time to make a difference. This global system and analytic tools are also what we need for cybersecurity. This is how we see in cyberspace, identify threats there and defend networks."[58]

Plans that make Internet surveillance more difficult will link to this cybersecurity disadvantage.

Executive authority. Presidential power over foreign affairs, which includes the collection of intelligence, is considered to be a primary. Any Congressional or court imposed restrictions on such authority arguably undermine executive leadership.

> The need for executive authority over electronic intelligence gathering becomes apparent when we consider the facts of the war against al Qaeda... But because the United States is in a state of war, the military can intercept the communications of the plane to see if it poses a threat, and target the enemy if necessary, without a judicial warrant because the purpose is not arrest and trial, but to prevent an attack... As Commander-in-Chief, the President has the constitutional power and the responsibility to wage war in response to a direct attack against the United States... In the wake of the September 11 attacks, Congress agreed that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," which recognizes the President's authority to use force to respond to al Qaeda, and any powers necessary and proper to that end. Even legal scholars who argue against this historical practice concede that once the United States has been attacked, the President can respond immediately with force. The ability to collect intelligence is intrinsic to the use of military force... Presidents have long ordered electronic surveillance without any judicial or congressional participation... Courts have never opposed a President's authority to engage in warrantless electronic surveillance to protect national security... Congress also implicitly authorized the President to carry out electronic surveillance to prevent further attacks on the United States. Congress's September 18, 2001, Authorization to Use Military Force is sweeping; it has no limitation on time or place—its only limitation is that the President is to pursue al Qaeda... The choice between FISA or his constitutional authority gives the President the discretion to use the best method to protect the United States, whether through the military or by relying on law enforcement. It also means warrantless surveillance will not be introduced into the criminal justice system; the judiciary is only needed to enforce this legal distinction.[59]

Although some affirmative teams will say they do not restrain the collection of foreign intelligence, domestic surveillance also exists for foreign intelligence collection purposes, so a restraint on domestic surveillance also creates a restraint on foreign surveillance.

> Recent debate about foreign intelligence surveillance relates to two key FISA provisions that were added and amended in the decade following the attacks of September 11, 2001. The first is the business records provision which was established by Congress in the USA PATRIOT Act, Section 215. The second provision governs the targeting of non-U.S. persons reasonably believed to be outside the United States, which was added by Section 702 of the FAA. Both of these provisions expanded the scope of foreign intelligence surveillance that can be conducted within the United States.[60]

There is a lot of impact evidence that indicates strong executive authority is critical to U.S. global leadership, military readiness, and global diplomacy. It is important to note this disadvantage probably only links to cases in the mass surveillance area of the topic. Domestic police crime fighting authority is not related to Presidential power.

Federalism. Federalism concerns the balance of power between the state governments and the federal government. Just as the founders put in checks and balances amongst the three branches of government—legislative, executive, and judicial—they also established checks between the federal and state governments in order to ensure one level of government did not get too much power. These checks are reinforced by the Tenth Amendment to the Constitution, which states that powers not explicitly given to the federal government are reserved to the states.

One of the powers largely reserved to the states is policing.

> Nevertheless, the falsification of federalism's design premises has not resulted in a catastrophic implosion of the U.S. into a unitary state. Although the balance of power no doubt has shifted over time, the American states have not been wiped off the constitutional map, nor have they

> been reduced to administrative satrapies of the national government. States continue to exercise significant and indeed primary authority over many areas of law, including those fields that most affect the lives of ordinary citizens—tort law, criminal law, contract law, property law, estate law, commercial law, and many others. States and localities today employ more than 87% of all government workers. The fields of criminal law enforcement and transportation, to name two prominent examples, are dominated by the states: 86% of all law enforcement officers and more than 99% of transportation workers are employed by a state or locality. The single largest government function in the United States, the provision of public education, is a state function; only ten thousand out of ten million teachers in the country are employed at the national level.[62]

Although cases that deal with state and local policing powers are unlikely to link to the executive power disadvantage, they are likely to link to the federalism disadvantage. This is because the only way to make these plans topical is to have the courts rule that a particular federal policing practice in the area of domestic surveillance is unconstitutional, meaning that the state practice would also be unconstitutional. This is an argued usurpation of state authority.

A strong respect for federalism is necessary to prevent the concentration of power in one level of government, which makes tyranny more likely. A diffusion of authority among levels of government also works to support the geographic diversification of value systems, which some argue is necessary to prevent cultural conflict, even civil war, both in the U.S. and abroad. There are internal links to federalism for countries such as Iraq, based on the claim that those countries model the U.S. federal system.

Since cases that restrict state power are not especially strategic, as they can easily be solved by a states counterplan (discussed in the counterplans section), I do not think many affirmative cases will link to this disadvantage, but it is good to have it prepared because a states counterplan with a federalism disadvantage as a net-benefit would be a great strategy.

It is worth noting that federalism may also be run as an advantage on this topic. Some teams may claim that certain federal surveillance practices threaten state and local policing, undermining federalism.

Impact turn disadvantages. Some teams will argue impact turns against certain advantages. For example, if the affirmative team reads a soft power advantage, they may say that U.S. soft power is bad because it undermines Chinese soft power, which is better. If the affirmative claims to increase U.S. hegemony, they might argue that U.S. hegemony is bad because it makes U.S. aggression more likely and triggers counterbalancing by other powers. These arguments are discussed in more detail in other essays.

There are also a number of disadvantages that link to plans that specify court action, particularly action by the U.S. Supreme Court.

Court politics. This disadvantage argues that court justices, particularly Supreme Court justices, are conscious of their own internal politics and that conservative justices are unlikely to make too many liberal decisions. The disadvantage argues that the liberal decision of the plan means that the justices will not make a liberal decision in a case that is pending and the negative will then argue that liberal decision is good.

Court activism/judicial minimalism. This disadvantage argues that it is bad for the courts to read new rights into the Constitution because that usurps the power of the legislative branch, whose job it is to legislatively establish new rights. It argues that the role of justices should be strictly to interpret the law, and that if the law does not explicitly establish a right, that it is bad to read it into the Constitution. Privacy, since it is not explicitly in the Constitution and is based on the reading of the right into the Constitution by looking at the values of a number of Amendments, is often criticized as being an activist right. Impacts to the disadvantage include tyranny that results from a violation of the separation of powers and a loss of court legitimacy.

Court legitimacy. While court legitimacy can be an impact to the activism disadvantage, it can also function independently as an argument that says unpopular decisions undermine the legitimacy of the court, making it more difficult for the court to enforce its rulings.

Case and controversy. This disadvantage says the affirmative cannot fiat a court decision without there being a case (and controversy that leads to the case) for the court to rule on. Teams argue that without a case and controversy, the court would be activist and lose its legitimacy. Given the nature of fiat, there is a highly contested link to this argument, but the more important issue is there are a lot of cases and controversies related to surveillance now, so while I'm sure this argument will be run, it does seem like a weak argument on this topic.

All of these disadvantages are inherently weak, but if the affirmative specifies the court, the negative can always counterplan with the legislature (see the next section), and argue that any risk of these disadvantages warrants a negative ballot.

Standard politics. Although the standard politics disadvantage was discussed at the beginning of this essay, I want to highlight that it also can be run against cases that rely on court decisions in the plan text. The link is that Congress will attempt to reverse the decision by passing legislation that voids or effectively modifies the decision, that it would be politically controversial in Congress, or that Obama's Supreme Court appointments would be blamed for the decision.

Counterplans

The one thing I especially like about this topic and resolution is that the role of typical generic agent counterplans is significantly limited.

States. The states counterplan is a regular on nearly every domestic topic, but there is no way for the states to reduce federal surveillance, so I don't imagine it coming into significant play on this topic. If the affirmative plan has the courts rule that a particular surveillance practice is unconstitutional and argues that same ruling would apply to state surveillance/policing practices,

negative teams could counterplan to have the states enact the curtailment of surveillance at the state level, reading politics, federalism, and disadvantages to court action as the net-benefits.

> Finally, states have passed their own laws to regulate the surveillance practices of state and local law enforcement agents as well as private actors. Those laws, which must respect the floor set by federal law, may be more restrictive of law enforcement practices and therefore more protective of privacy interests. To avoid undue complexity, this article will focus on federal statutes and federal constitutional law.[61]

They could even have the states amend their constitutions to provide the same protection the affirmative establishes but at the state level.

Agent counterplans. If the affirmative specifies their agent (courts, legislative, executive), the negative could counterplan to use a different agent and read disadvantages that the affirmative. For example, if the affirmative uses the courts (usually the Supreme Court) as the actor, the negative could counterplan to have Congress amend the constitution and then read court disadvantages (court politics, court legitimacy, deference, activism). But, since the affirmative has the option of specifying or not specifying their agent, *it really is the affirmative's choice* as to whether or not they wish to invite the agent counterplan debate.

Advantage counterplans. Teams will read counterplans to solve the advantages through other means, such as strengthening the economy to promote hegemony and closing Guantanamo Bay, Cuba, to boost U.S. soft power. They will then read disadvantages that are specific to the surveillance curtailment in the plan as net-benefits.

Other reforms. Negative teams will likely counterplan with other surveillance reforms and argue those reforms are less politically controversial or present smaller risks of terrorism. Since many affirmative teams may rely on plans that are direct reductions in order to get out of state action links to kritiks, a strong negative strategy will be to counterplan with some type of reform-oriented approach that avoids disadvantages (likely terrorism and politics) to completely eliminating the program.

Kritiks

There is always plenty of kritik ground on most topics, and many of the generic kritiks always apply. There are also some specific kritiks that can be run.

One thing that is important to note at the outset is that it is topical for the affirmative's plan to *only* include negative state action—to just reduce surveillance. If the plan attempts a regulatory curtailment, then there would still be state action in the plan/as part of the affirmative's advocacy, and there would still be state action links, but it will be hard to win them against any permutation if the plan just includes negative state action.

Legalism. This kritik argues legal reforms are bad and end up sanitizing dominant power structures that support intervention and conflict.

> Within this framework, Western law has constantly enjoyed a dominant position during the past centuries and today, thus being in the position to shape and bend the evolution of other legal systems... [T]he United States have been dominating the international arena as the most powerful economic power, exporting their own legal system to the "periphery"... The theory of "lack" and the rhetoric of the rule of law have justified aggressive interventions from Western countries into non-Western ones... [L]aw played a major role in legalizing such practices of powerful actors against the powerless. This use of power is scarcely explored in the study of Western law.[63]

Racism. The demand for objectivity and rationality in the law supports racism.

> *Law is the exemplary countenance of the conscious and calculated rationality of modern life, it is the emblematic face of liberal civilization. Law and legal rules symbolize the spirit of science, the march of human progress. As Max Weber, the reluctant liberal theorist of the ethic of rationalization, asserted: judicial formalism enables the legal system to operate like a technically rational machine... Subjugation of the Other races in the colonial empires was motivated by power and rapacity, but it was justified and indeed rationalized, by an appeal to the civilizing influence of religion and law: western Christianity and liberal law*... By contrast, liberal ideology and modernity were abrasively unmythic, rational and controlled... In his *Mythology of Modern Law*, Fitzpatrick has shown that the enabling claims of liberalism, specifically of *liberal law*, are not only untenable but *implicated* in canvassing a *racist justification of its colonial past* and in eliding the racist basis of the structure of liberal jurisprudence. Liberal law is *mythic* in its presumption of its neutral, objective status. Specifically, the liberal legal story of its immaculate, analytically pure origin obscures and veils not just law's own ruthless, violent, even savage and disorderly trajectory, but also its constitutive association with imperialism and racism... For liberal law carries on its back the payload of "progressive," pragmatic, instrumental modernity, its ideals of order and rule of law, its articulation of human rights and freedom, its ethic of procedural justice, its hostility to the sacred, to transcendence or spiritual complexity, its recasting of politics as the handmaiden of the nomos, its valorization of *scientism* and rationalization in all spheres of modern life. Liberal law is not synonymous with modernity tout court, but it is the exemplary voice of its rational spirit, the custodian of its civilizational ambitions... Liberal law's constitutive bias is in a sense incidental: *the real problem is racism* or the racist basis *of liberal ideology and culture*. The internal racial other is not the juridical equal in the mind of liberal law but the juridically and humanly inferior Other, the perpetual foreigner.[64]

Critical Legal Studies scholars argue that the law is not above the political and that it can be, and is, easily manipulated to protect the interests of the dominant groups in society.

For example, what is a "pervasively regulated industry," "probable cause," or "reasonable suspicion"? Since these are evaluated on a case-by-case basis (really no other way to do it), it wouldn't be too difficult to say that the government needs "probable cause" to engage in surveillance of a white person (in a given situation), but that surveillance of public housing in a particular instance (where many minorities live) can be justified without probable cause.

Critics argue that rights alienate people from each other, undermine an ethic of care, are indeterminate and hence difficult to enforce, discourage other means to protect peoples' interests, and are really designed to protect the interests of the dominant class. One author "trashes" claims of objectivity in legal argument. Another claims that existing patterns of legal argumentation "freeze social reality" and make alternative visions impossible.

This is obviously very similar to the critique of the law mentioned above, but I mention it separately because it is a separate body of literature and there are great cards in this literature that explain the law is *indeterminate*—that legal standards can be manipulated in different instances to justify different outcomes. These are great generic solvency arguments against any cases that rely on curtailing surveillance by instituting new legal standards.

Feminism. There are a number of authors who challenge protecting privacy on the grounds that it supports spousal abuse—the privacy makes it easier for men to abuse women in the home.

> More generally, MacKinnon, Carol Pateman, and other feminist critics look at the history of the distinction between public and private, and see in it a stratagem through which men have claimed for themselves an unlimited exercise of power, among whose primary uses has been to subordinate women. The Greek distinction between the *polis* and the *oikos*, one of the most foundational sources for our modern ideas of public and private, functioned exactly this way. As Aristotle articulates, it is the distinction between a sphere in which a man is an equal among equals, constrained by demanding norms of reciprocity and justice, and a sphere in which he rules as king. Aristotle subtly distinguishes the rule of a man over a wife from his rule over slaves: the kindly husband is supposed to take his wife's views into account in some way. And yet both forms of royal rule are even more strongly distinguished from the rule practiced among citizens, which is not kingly rule at all, but rather a "ruling and being ruled by turns." The private domain is thus defined as a domain in which the powerful have a sway unlimited by considerations of equality and reciprocity. This history tells us that even when appeals to privacy appear to protect the interests of women (or children), we should be skeptical, and be sure to ask whose interests really are advanced.[65]

Capitalism. Debaters always find a way to make the capitalism kritik link, and while it may be difficult to get a state action link against cases that do not involve regulatory curtailments, cases that claim to strengthen industry, strengthen the economy, and make it easier for U.S. companies to do business abroad will still link. These links are obvious, and I suspect that people will become even more creative.

Conclusion

The resolution grew out of a recent and ongoing controversy related to surveillance, especially mass surveillance. Although the surveillance controversy extends beyond the shores of the United States, the resolution does limit topical plan action to curtailing domestic surveillance. The fact that Americans are frequently caught-up in the surveillance of foreigners, and that most Internet traffic flows through the U.S., means that there will be topical cases in the "foreign" area, though these will be limited and always contestable with topicality.

It is topical for affirmative cases to act beyond the area of mass surveillance and address reductions in suspicion-based surveillance, but many of these cases address issues related to policing, and it will be difficult for the affirmative to both topically and strategically access many of these cases because most policing occurs at the state and local levels. Given this, I suspect that most affirmative cases will deal with mass surveillance, though some cases will focus on more limited, at least in terms of quantity, federal police surveillance. Very popular cases in this area will deal with the federal surveillance of racial minorities, surveillance at the border, and DNA surveillance. These cases will be popular because they are topical, they are focused on issues people like to debate about, and they offer an opportunity for the affirmative to stake out some relatively unique ground.

Some teams may be creative and extend surveillance reductions outside the areas of counter-terrorism and policing to focus on areas such as biomedical surveillance. These creative cases will likely make excellent kritik affirmative cases.

There are many different advantages that can potentially be claimed from curtailing surveillance, including the protection of privacy, strengthening free speech, the reduction of racism, Internet freedom, economic growth, and an improvement in U.S. global status. These advantage areas will make interesting debates onto themselves.

Although the cases will be very strong, there are a number of strong disadvantages with significant consequentialist impacts that can outweigh many of these cases. The terrorism disadvantage is the core "topic DA," and teams should be prepared to debate it. As always, politics will be popular and can outweigh many advantages.

Negative teams can also place affirmative teams in a basic counterplan-kritik double bind. Affirmative teams that advocate direct reductions rather than regulatory approaches will be vulnerable to counterplans that establish such standards. Terrorism and politics disadvantages are likely to be net-benefits to such counterplans. Affirmative teams that rely on such standards will be vulnerable to many different kritiks of legal approaches. Counterplans to eliminate the practices the affirmative criticizes in the 1AC will solve many (or all) affirmative advantages and will make the kritiks excellent net-benefits.

The combination of strong arguments for both the affirmative and the negative that intersect the current issues of mass and targeted surveillance should make for excellent debates on both sides. I look forward to helping debaters prepare for this important topic.

(For article end notes, see next page.)

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End Notes

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